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PP

v.

TEONG LUNG CHIONG & ORS

B

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
AZMEL MAAMOR FCJ
[CRIMINAL APPEAL NO: 05-58-2002 (Q)]

C

8 FEBRUARY 2010

CRIMINAL LAW: *Penal Code - Sections 302 and 34 - Murder - Common intention - Assessors - Cautioned statements, cumulative effect of - Confession of co-accused - Whether identification of who actually committed crime necessary - Circumstantial evidence - Findings of fact - Evidence Act 1950, s. 30*

D

CRIMINAL PROCEDURE: *Trial - Assessors' opinions - Whether scrutiny of trial judge's judgment without taking into account that trial was with two assessors amounted to an error*

E

CRIMINAL PROCEDURE: *Statements - Cautioned statement - Cumulative effect of cautioned statements - Confession of co-accused - Evidence Act 1950, s. 30 - Penal Code, ss. 34, 302*

F

EVIDENCE: *Statement - Cautioned statement - Cumulative effect of cautioned statements - Confession of co-accused - Evidence Act 1950, s. 30 - Penal Code, ss. 34, 302*

G

The respondents and another person, the 4th accused (who was discharged and acquitted without his defence being called at the close of the prosecution's case), were charged, in furtherance of the common intention of them all, with causing the death of one Hew Leh Poh ('deceased'), an offence punishable under s. 302 of the Penal Code ('Code') read with s. 34 of the Code. The High Court trial judge, aided by two assessors, held that the prosecution had proved beyond reasonable doubt that: (i) the deceased had died on the date, time and place as in the charge; (ii) the death of the deceased was caused by the act or acts of one or more or all of the respondents; (iii) the act or acts was or were done with the clear intention of causing death to the deceased; and (iv) the act or acts of one or more or all of the respondents which caused the deceased's death was or were done in furtherance of a common intention of all the respondents. The trial judge went on to say that

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although the respondents in their respective cautioned statements laid the blame for the actual strangling of the deceased on one another, the fact remained that the deceased was strangled to death by the act or acts of one or more or all of them. The respondents' subsequent appeal to the Court of Appeal was allowed. The Court of Appeal held that the trial judge had erred in considering the cautioned statements of the respondents as confessions and thus invoking, albeit indirectly, s. 30 of the Evidence Act 1950 ('Act'). Dissatisfied with the Court of Appeal's judgment, the appellant appealed to this court on the following issues: (1) the trial judge did not rely on s. 30 of the Act in convicting the respondents; (2) there was common intention both to rape and murder the deceased; (3) there was no necessity to identify who actually committed the offence; (4) confession of co-accused; (5) s. 30 of the Act was applicable; and (6) there was unimpeached circumstantial evidence connecting all the respondents to the crime of murder.

Held (allowing the appeal, and restoring the convictions and sentences imposed upon the respondents by the trial judge)
Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) The Court of Appeal failed to consider the trial judge's detailed summing up to the assessors who returned after deliberating the findings of fact. Such findings should not be casually ignored or interfered with by an appellate court. This was not a case where it was alleged that the trial judge invited the assessors to make a particular finding of fact, which would have amounted to misdirection. Moreover, the respondents' cautioned statements were part and parcel of the evidence adduced. As such, the assessors were very well-appraised of their evidential value by the trial judge in his summing up. Therefore, the Court of Appeal erred in reaching its decision solely by scrutinising the trial judge's judgment without taking into account that the trial was with two assessors. The outcome of the appeal might have been different if it had done so. (paras 31, 32, 33 & 34)

(2) In respect of issues (1), (4) and (5) (dealt together as they were interrelated), there was no doubt that the deceased was killed in the presence of the respondents after she was raped by them. The reason for killing her was also given by the respondents in their respective cautioned statements, which

was to avoid trouble with the police due to the rape. Based on the cumulative effect of the respective cautioned statements of the respondents, even when considered separately and independently in relation to the issue of common intention, and the other evidence adduced, circumstantial and otherwise, the responsibility should rest solely on all the respondents. There was no issue of alibi or that they had nothing to do with the killing. In fact, all the cautioned statements mentioned that the deceased was strangled with a nylon string or rope in their presence and none of them did anything to stop it. There was also no issue that they all worked together to dispose of the body. The trial judge was thus correct when he said in his judgment that although the respondents in their cautioned statements laid the blame for the actual strangling of the deceased on one another, the fact remained that the deceased was strangled to death by the act or acts of one or more or all of the respondents. It should be noted that the respondents were jointly charged in furtherance of common intention for the murder of the deceased with specific reference to s. 34 of the Code. Hence, it should not be so much as scrutinising the cautioned statements to find whether they contained individual and specific confessions by each of the respondents for murder. Rather, their cumulative effect provided the evidence on the killing of the deceased. Accordingly, the Court of Appeal erred when it only focused on confessions in the cautioned statements and the application of s. 30 of the Act instead of looking at the evidence adduced as a whole in the same way as the trial judge did. (paras 45, 46, 47, 48 & 49)

(2a) The Deputy Public Prosecutor's submission on the applicability of s. 30 of the Act was also correct. Indeed, on closer reading of the 3rd respondent's cautioned statement he did confess that they would be in trouble if the deceased escaped. Therefore, all the respondents had every reason to kill the deceased, and who did the actual killing was quite immaterial. However, the 3rd respondent, in his cautioned statement, implicated the 1st and 2nd respondents as the persons who committed the act or acts of killing the deceased. Thus, even if s. 30 of the Act was impliedly invoked by the trial judge as perceived by the Court of Appeal such reliance would have been justified in law. *Chin Seow Noi v. PP* (foll). (paras 50, 51, 52 & 53)

(3) As for issue (6), there was, on the facts, ample relevant circumstantial evidence implicating the respondents to the deceased's murder: (a) the 1st respondent's admission that he was responsible for the ransom notes sent to the deceased's family; (b) the 1st respondent came to collect the ransom money of RM3,000; (c) the 1st respondent led the police to the place where the skeletal remains of the deceased were found; and (d) the 1st respondent was the person who sent the deceased's flowery pants to her family in order to convince them of the seriousness of his demand. In addition to the above, the respondents, in their respective cautioned statements, admitted raping the deceased and further admitted that they had every reason not to let her escape otherwise they would be in trouble. By themselves, that evidence might not be sufficient to convict the respondents but when combined with the respondents' cautioned statements taken individually or by invoking s. 30 of the Act, the respondents' guilt would be confirmed beyond reasonable doubt. (paras 57, 58 & 59)

(4) Regarding issue (2), upon finding that there was a common intention to rape the deceased and in furtherance of that common intention the deceased was murdered in order to prevent her from reporting on the respondents, the Court of Appeal clearly erred in not directing its attention to the application of s. 34 of the Code to uphold the conviction of murder imposed upon the respondents. In addition, it is a question of fact whether an act or acts of one or more accused persons in committing an offence was or were done in furtherance of a common intention of all the accused persons. In the present case on this issue, the assessors had given their affirmative findings of fact, which the trial judge concurred with. That should settle it since an appellate court should be slow to interfere with the trial court's findings of fact. (paras 61 & 62)

(5) As for issue (3), it would appear that the Court of Appeal was looking for a direct link to who actually among the respondents committed the act or acts of killing the deceased. The Court of Appeal seemed to be quite oblivious of the fact that the respondents were jointly charged with s. 34 of the Code invoked, which was an approach not quite in tandem

A with the settled law. With s. 34 of the Code invoked, there was no requirement for the prosecution to prove who exactly ultimately caused the deceased's death. *Ong Chee Hoe v. PP* (foll). (paras 63, 64 & 65)

B ***Bahasa Malaysia*** *Translation Of Headnotes*

Responden-responden dan seorang lagi, tertuduh keempat (yang telah dibebaskan dan dilepaskan tanpa pembelaannya dipanggil pada penghujung kes pendakwaan), telah dituduh, dalam perlanjutan niat bersama mereka semua, dengan menyebabkan kematian seorang C yang bernama Hew Leh Poh ('si mati'), suatu kesalahan yang boleh dihukum di bawah s. 302 Kanun Keseksaan ('Kanun') dibaca bersama dengan s. 34 Kanun. Hakim perbicaraan Mahkamah Tinggi, dibantu oleh dua pengapit-pengapit, mendapati bahawa D pendakwaan telah membuktikan melampaui keraguan munasabah bahawa: (i) si mati telah meninggal dunia pada tarikh, masa dan tempat seperti dalam tuduhan; (ii) kematian si mati telah disebabkan oleh tindakan atau tindakan-tindakan satu atau lebih atau semua responden-responden; (iii) tindakan atau tindakan-E tindakan telah dilaksanakan dengan niat jelas menyebabkan kematian terhadap si mati; dan (iv) tindakan atau tindakan-tindakan satu atau lebih atau semua responden-responden yang telah menyebabkan kematian si mati dalam perlanjutan niat bersama semua responden-responden. Hakim perbicaraan terus mengatakan bahawa walaupun F responden-responden di dalam pernyataan-pernyataan beramaran mereka menyalahkan satu sama lain melakukan penjerutan sebenarnya si mati, fakta sebenarnya ialah bahawa si mati telah dijerut hingga mati oleh tindakan atau tindakan-tindakan satu atau lebih atau semua mereka. Rayuan kemudiannya responden-responden G ke Mahkamah Rayuan telah dibenarkan. Mahkamah Rayuan memutuskan bahawa hakim perbicaraan telah khilaf apabila menimbangkan pernyataan-pernyataan beramaran responden-responden sebagai pengakuan dan, oleh itu, menggunakan, secara tidak langsung, s. 30 Akta Keterangan 1950 ('Akta'). Tidak berpuas H hati dengan penghakiman Mahkamah Rayuan, perayu merayu ke mahkamah ini atas isu-isu yang berikut: (1) hakim perbicaraan tidak bergantung atas s. 30 Akta apabila menyabitkan responden-responden; (2) terdapat niat bersama untuk merogol dan membunuh si mati; (3) tidak ada keperluan untuk mengenalpasti siapa yang I sebenarnya melakukan kesalahan tersebut; (4) pengakuan tertuduh bersama; (5) s. 30 Akta boleh digunapakai; dan (6) terdapat keterangan ikut keadaan yang tidak dicabar yang mengaitkan semua responden-responden kepada jenayah membunuh tersebut.

Diputuskan (membenarkan rayuan, dan mengembalikan sabitan-sabitan dan hukuman-hukuman yang dikenakan ke atas responden-responden oleh hakim perbicaraan)
Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Mahkamah Rayuan gagal menimbangkan penggulungan teliti hakim perbicaraan kepada pengapit-pengapit yang kembali selepas mempertimbangkan dapatan-dapatan fakta. Dapatan-dapatan sebegitu tidak seharusnya tidak dihirau atau diusik oleh suatu mahkamah rayuan. Ini bukanlah suatu kes di mana ia telah dikatakan bahawa hakim perbicaraan telah meminta pengapit-pengapit membuat sesuatu dapatan fakta khusus, yang akan merupakan salah arahan. Tambahan lagi, pernyataan beramaran responden-responden ialah sebahagian daripada keterangan yang dikemukakan. Oleh itu, pengapit-pengapit diberitahu nilai keterangan mereka oleh hakim perbicaraan dalam penggulungannya. Oleh yang demikian, Mahkamah Rayuan khilaf apabila mencapai keputusannya hanya dengan menelitikan penghakiman hakim perbicaraan tanpa menimbangkan bahawa perbicaraan tersebut dijalankan dengan dua pengapit-pengapit. Hasil rayuan tersebut mungkin berbeza jika ia membuat demikian.

(2) Berhubung dengan isu-isu (1), (4) dan (5) (yang dipertimbangkan bersama kerana mereka saling berkaitan), tidak ada apa-apa keraguan bahawa si mati telah dibunuh di hadapan responden-responden selepas beliau telah dirogol oleh mereka. Sebab untuk pembunuhannya juga telah diberi oleh responden-responden dalam pernyataan-pernyataan beramaran mereka, iaitu untuk mengelak dari kesusahan dengan polis akibat perogolan tersebut. Berdasarkan kesan kumulatif pernyataan-pernyataan beramaran responden-responden masing-masing, meskipun ditimbangkan berasingan dan bebas berhubung dengan isu niat bersama, dan keterangan lain yang dikemukakan, ikut keadaan dan selainnya, tanggungjawab semestinya diletak secara tunggal atas responden-responden. Tiada isu alibi atau bahawa mereka tidak ada apa-apa kaitan dengan pembunuhan tersebut. Sebenarnya, semua pernyataan-pernyataan beramaran menyebut bahawa si mati telah dijerut dengan tali nilon di hadapan mereka dan tidak seorang pun di antara mereka yang membuat apa-apa untuk menghentikannya. Juga tiada isu bahawa mereka semua bekerjasama untuk menghapuskan mayat tersebut. Hakim bicara oleh itu betul

apabila beliau berkata dalam penghakimannya bahawa walaupun responden-responden di dalam pernyataan-pernyataan beramaran mereka menyalahkan satu sama lain atas penjerutan sebenarnya si mati, ia kekal bahawa si mati telah dijerut hingga mati oleh tindakan atau tindakan-tindakan satu atau lebih atau semua responden-responden. Ia sepatutnya diingat bahawa responden-responden telah dituduh bersama melanjutkan niat bersama membunuh si mati dengan rujukan khusus kepada s. 34 Kanun. Oleh yang demikian, ia bukan sebenarnya mengenai penelitian pernyataan-pernyataan beramaran tersebut untuk mengetahui sama ada ada mereka mengandungi pengakuan individu dan khusus oleh setiap responden bagi membunuh. Sebaliknya, kesan kumulatif mereka menyediakan keterangan mengenai pembunuhan si mati. Oleh itu, Mahkamah Rayuan khilaf apabila ia bertumpu pada pengakuan-pengakuan dalam pernyataan-pernyataan beramaran tersebut dan pemakaian s. 30 Akta dan bukan menimbangkan keterangan yang dikemukakan secara keseluruhan dalam cara yang sama seperti yang dibuat oleh hakim perbicaraan.

(2a) Hujahan Penolong Pendakwa Raya atas keterterapan s. 30 Akta juga adalah betul. Malah, atas pembacaan teliti pernyataan beramaran responden ketiga beliau telah mengaku bahawa mereka akan ditimpa kesusahan jika si mati melepaskan diri. Oleh yang demikian, semua responden-responden mempunyai sebab ketara untuk membunuh si mati, dan siapa yang melakukan pembunuhan sebenarnya tidak penting. Walau bagaimanapun, responden ketiga, di dalam pernyataan beramarannya, membabitkan responden-responden pertama dan kedua sebagai orang yang melakukan tindakan atau tindakan-tindakan yang membunuh si mati. Oleh itu, jikapun s. 30 Akta digunakan secara tersirat oleh hakim perbicaraan seperti yang dikesan oleh Mahkamah Rayuan pergantungan sedemikian berjustifikasi dalam undang-undang. *Chin Seow Noi v. PP* (diikuti).

(3) Mengenai isu (6), terdapat, berdasarkan fakta-fakta, cukup keterangan ikut keadaan relevan yang membabitkan responden-responden kepada pembunuhan si mati: (a) pengakuan responden pertama bahawa beliau bertanggungjawab menghantar nota-nota meminta wang tebusan kepada keluarga si mati; (b) responden pertama datang untuk mengutip wang

tebusan sebanyak RM3,000; (c) responden pertama membawa polis ke tempat di mana tulang-tulang mayat si mati ditemui; dan (d) responden pertama merupakan orang yang menghantar seluar bercorak bunga si mati kepada keluarganya untuk meyakinkan mereka tentang keseriusan tuntutannya. Tambahan lagi, responden-responden, dalam pernyataan-pernyataan beramaran mereka masing-masing, mengaku merogol si mati dan lagi mengaku bahawa mereka mempunyai sebab tertentu untuk tidak membenarkan beliau melepaskan diri kalau tidak mereka akan ditimpa kesusahan. Secara tunggal, keterangan tersebut mungkin tidak cukup untuk menyabitkan responden-responden tetapi bila digabungkan dengan pernyataan-pernyataan beramaran responden-responden sama ada diambil secara individu atau melalui menggunakan s. 30 Akta, kebersalahan responden-responden akan diesahkan melampaui keraguan munasabah.

(4) Berkenaan dengan isu (2), setelah mendapati bahawa terdapat niat bersama untuk merogol si mati dan untuk melanjutkan niat bersama tersebut si mati dibunuh untuk menghalangnya mengadu tentang responden-responden, Mahkamah Rayuan jelas khilaf apabila tidak menumpukan perhatiannya kepada pemakaian s. 34 Kanun untuk mempertahankan sabitan membunuh yang dikenakan ke atas responden-responden. Lagipun, ia merupakan suatu soalan fakta sama ada tindakan atau tindakan-tindakan satu atau lebih orang yang kena tuduh bila melakukan suatu kesalahan telah dibuat dalam perlanjutan niat bersama semua orang yang kena tuduh tersebut. Dalam kes semasa atas isu ini, pengapit-pengapit telah memberi dapatan-dapatan fakta afirmatif mereka, yang hakim perbicaraan telah bersetuju dengan. Itu sepatutnya menyelesaikannya kerana mahkamah rayuan seharusnya bertindak dengan cermat bila mengusik dapatan-dapatan mahkamah perbicaraan.

(5) Tentang isu (3), ia nampaknya bahawa Mahkamah Rayuan mencari sesuatu penghubung terus kepada siapa di antara responden-responden yang melakukan tindakan atau tindakan-tindakan yang membunuh si mati. Mahkamah Rayuan nampaknya tidak sedar fakta bahawa responden-responden telah dituduh bersama dengan s. 34 Kanun digunakan, yang merupakan suatu pendekatan yang tidak selaras dengan undang-undang mantap. Dengan penggunaan s. 34 Kanun,

A tidak ada keperluan untuk pendakwaan membuktikan siapa sebenarnya yang menyebabkan kematian si mati. *Ong Chee Hoe v. PP* (diikuti).

Case(s) referred to:

B *Chin Seow Noi v. PP [1994] 1 SLR 135* ***(refd)***
Juhari Ibrahim v. PP [1973] 1 LNS 59 FC ***(refd)***
Kuan Ted Fatt v. PP [1985] 1 CLJ 150; [1985] CLJ (Rep) 174 FC ***(refd)***
Noliana Sulaiman v. PP [2001] 1 CLJ 36 HC ***(refd)***
Ong Chee Hoe v. PP [1999] 4 SLR 688 ***(foll)***
Prasong Bunsom & Ors v. PP [1995] 3 SLR 433 ***(foll)***
C *Sabaee Bujang v. PP [2006] 1 CLJ 423 CA* ***(refd)***
The Board Of Trustees Of The Sabah Foundation & Ors v. Datuk Syed Kechik Syed Mohamed & Anor [2008] 3 CLJ 221 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 30
D Penal Code, ss. 34, 302
Rules of the Federal Court 1995, r. 137

For the appellant/prosecution - Wong Chiang Kiat DPP
For the respondents - Augustine Liom; M/s Tang & Co

E *[Appeal from Court of Appeal, Criminal Appeals Nos: Q-05-17-96, Q-05-20-96 & Q-05-21-96]*

[Editor's note: For the Court of Appeal judgment, please see Teong Lung Chiong & Ors v. PP [2003] 2 CLJ 171.]

F *Reported by Suresh Nathan*

JUDGMENT

G **Richard Malanjum CJ (Sabah & Sarawak):**

Preliminaries

[1] In our oral decision delivered on 20 November 2007 we unanimously allowed the appeal by the appellant/prosecution. We H thus set aside the order of the Court of Appeal and restored the convictions and sentences imposed upon the respondents by the learned High Court trial Judge.

[2] Subsequently the respondents filed an application under r. 137 I of the Rules of the Federal Court 1995 to review our decision. We now give the reasons for our decision.

[3] The charge preferred against the respondents and another 4th accused was for murder. The charge read that on 14 July 1991 between 2pm and 5pm in a hut at 81/2 km, Teku Road, Sibu, in the State of Sarawak, in furtherance of the common intention of them all, they caused the death of Hew Leh Poh (f), an offence punishable under s. 302 of the Penal Code read with s. 34 of the same Code.

[4] At the close of the case for the prosecution, the 4th person charged was discharged and acquitted without his defence being called.

[5] It was the case for the Prosecution that the victim, Hew Leh Poh (f) (deceased) was 13 years old at the time of the incident. She was last seen by her father on 14 July 1991 at about 2pm. She was walking home from the noodle stall operated by her parents. When she failed to reach home at about 6pm her family began to look for her.

[6] After searching for two days the family did not find the deceased. Her father therefore lodged with the police a missing person report. (exh. P8).

[7] For the next two months the deceased was still not found. Then on 17 September 1991 PW8, the sister of the deceased, received a letter (exh. P11) addressed to her demanding the payment of RM10,000 for the safe return of the deceased.

[8] On 19 September 1991 a second letter (exh. P12) was received by PW8. It stipulated that the payment was to be sent to one Steven Ting of P.O. Box 947, 96000 Sibu. The currency denominations were prescribed to be in Malaysian Ringgit 500 and 1000 and old currency preferred.

[9] Subsequently a third letter was received on 29 September 1991 together with short flowery pants (exh. P13) identified by PW8 as belonging to the deceased. By then the ransom demanded had gone up to RM15,000.

[10] On 4 October 1991 and on the advice of the police a sum of RM3,000 together with a letter was delivered to the General Post Office Sibu at P.O. Box 947, 96000 Sibu addressed to one Steven Ting. From that moment onwards the police set up observation points to see who would come to collect the money from the General Post Office.

[11] Then on 6 October 1991 at about 9am the 1st respondent came to pick up the money from its location at the General Post Office riding a motorcycle bearing registration number SE 7430. We noted that this fact was not denied by the 1st respondent. He also admitted writing the letters to PW8 including sending the flowery pants. He gave his reasons for doing so in his defence.

[12] The 1st respondent was then trailed by the police for the next one week before arresting him on 14 October 1991.

[13] The arrest of the 1st respondent led to the discovery of skeletal remains of a human being which was subsequently confirmed to be that of the deceased Hew Leh Poh based on the findings of her ring and sandals she was last seen wearing before her disappearance.

[14] The Forensic Pathologist in her report stated that the cause of death was 'indeterminable but the ligature with reap knot suggests strangulation'.

[15] Subsequent to the arrest of the 1st respondent and the discovery of the human remains the 2nd respondent was arrested on 15 October 1991 around 3am while the 3rd respondent was arrested at about 10am on the same day.

Before The High Court

[16] The trial was before the learned High Court trial Judge (learned trial judge) aided by two assessors.

[17] Upon conclusion of the hearing the learned trial judge summed up the case in detail to the two assessors. In his summing up the learned trial judge, *inter alia*:

a. informed the assessors that they were to consider some questions on specific issues of facts relevant to the charge;

b. advised the assessors that in arriving at their decisions or conclusions on matters of facts they must do so based only on the evidence that have been presented before them in the course of the trial; and

c. that they must not take into account or be in any way swayed or influenced by any extraneous matters or rumours or things that they might have heard outside the court or of which might otherwise have become aware outside the court concerning the case before they came to court.

[18] On completion of the summing up the assessors took time to deliberate on the case. Subsequently they gave their opinions on the factual aspects of the case guided by the set of questions posed to them by the learned trial judge.

[19] The learned trial judge concurred with the opinions of the assessors. He thus proceeded to convict the respective respondents for the offence of murder and sentenced each one of them to death as stipulated under s. 302 of the Penal Code (the Code) read with s. 34 of the same Code.

[20] Briefly in his judgment the learned trial judge agreed with the factual findings and opinions of the assessors that the prosecution had proved beyond reasonable doubt that:

a. the deceased had died on the date, time and place as in the charge;

b. the death of the deceased was caused by the act or acts of one or more or all of the accused;

c. the act or acts was or were done with the clear intention of causing death to the deceased; and

d. the act or acts of one or more or all of the accused which caused the death of the deceased was or were done in furtherance of a common intention of all the accused.

[21] In his judgment the learned trial judge expressed his concurrence with the factual findings and opinions of the assessors. He went on to say that although the respondents in their respective cautioned statements laid the blame for the actual strangling of the deceased on one another, the fact remained that the deceased was strangled to death by the act or acts of one or more or all of the respondents.

[22] When considering whether the act or acts of one or more or all of the respondents which caused the death, was or were done in furtherance of the common intention of all of them, the learned trial judge, as in his summing up to the assessors, was very careful in his approach in relation to the respective cautioned statements of the respondents. He said that it was necessary to look, examine and consider the cautioned statements (exh. P77, P78 and P79) quite independently of each other. With such precaution in his mind the learned trial judge noted that the cautioned statements disclosed why

and how the deceased was killed. The reason for killing her was to avoid any trouble with the police due to the rape. Hence, the deceased was slowly strangled with a nylon rope. In his cautioned statement the 1st respondent even said that it took 15 to 20 minutes for the deceased to die. Thereafter all the respondents worked together to dispose off her body.

[23] In his concluding remark the learned trial judge said that on the evidence, facts and law and for the reasons he gave, he found the defence had not 'raised or created any doubt as to the truth of the prosecution's case or as to the guilt' of the respondents and that he found that the prosecution had 'proved beyond reasonable doubt all the essential elements of the charge' against the respondents.

Before The Court Of Appeal

[24] The respondents appealed to the Court of Appeal. In allowing the appeals the Court of Appeal said this:

> A scrutiny of the judgment reveals that the learned Judge had gathered the common Intention to murder the deceased by inferences, mainly, from (i) the conduct of each Appellant in not preventing the others from strangling the deceased to death but simply watching the deceased being slowly strangled and choked to death, (ii) the fact that the deceased was earlier raped by each of them and that they would be in trouble if they were to let the deceased free and therefore, there was a need to kill the deceased and (iii) their participation in actively assisting each other in the clumsy disposal of the deceased's body. *Although the learned Judge did not categorically indicate that he applied the provisions of section 30 of the Evidence Act 1950 (the Act), in reality, he took into consideration the contents of each of the cautioned statements as confession as against the other Appellants.*
>
> In our view, with due respect, the learned Judge erred in his approach leading to the conviction on the following grounds:
>
> > Firstly, *the cautioned statement of each Appellant does not tantamount to confession of murder,* though in the cases of the 2nd and 3rd Appellants they are a confession to having committed rape on the deceased. Therefore, *they are not a confession for the offence of murder as charged to merit any consideration under section 30 of the Act. Secondly, even assuming that the cautioned statements tantamount to confession of murder, there must be other evidence independent of the cautioned statements sufficient to support the conviction of murder.* In this

> case there was no such evidence. In respect of the lst Appellant, although there was evidence against him that he wrote the ransom notes, he was caught collecting part of the ransom money, part of which was subsequently found in his possession, and he cooperated with the police leading to the discovery of the deceased's bones and the arrest of the other Appellants, to our mind, that evidence is not sufficient to found a conviction of murder against him ... (emphasis added).

Before This Court

[25] Dissatisfied with the judgment of the Court of Appeal the appellant/prosecution appealed to this court on twelve grounds. Learned deputy Public Prosecutor in his submission categorized them thus:

a. 1st issue – Grounds 9 and 10 – The learned trial judge did not rely on s. 30 of the Evidence Act 1950 in convicting the respondents;

b. 2nd issue – Grounds 5 and 12 – There was common intention both to rape and murder the deceased Hew Leh Poh;

c. 3rd Issue – Ground 6 – There was no necessity to identify who is the actual doer of the offence;

d. 4th Issue – Grounds 7 and 8 – Confession of co-accused;

e. 5th Issue – Ground 11 – Section 30 of the Evidence Act 1950 is applicable; and

f. 6th Issue – Grounds 1, 2, 3 4 – There are unimpeached circumstantial evidence connecting all the respondents to the crime of murder.

[26] Before considering each of the issues posed we need to emphasize here that in this appeal the dissatisfaction of the appellant/prosecution was on the judgment of the Court of Appeal. Accordingly there was no necessity for us to address the remarks and assertions by learned counsel for the respondents on the alleged shortcomings which occurred during the trial stage. Such points should have been canvassed before the Court of Appeal. In our view it would not be appropriate for this court when considering this appeal by the appellant/prosecution to revisit those points unless gross miscarriage of justice would be caused otherwise. In the present appeal we found none.

[27] Further, we pause to note that the Court of Appeal focused its attention on the judgment of the learned trial judge and merely paid lip-service to the fact that the trial was conducted with the aid of two assessors.

[28] It had been judicially stated that the role of assessors in a murder trial should not be misunderstood or overlooked. Assessors play an important and critical part on question of facts. In *Kuan Ted Fatt v. Public Prosecutor* [1985] 1 CLJ 150; [1985] CLJ (Rep) 174 this is what Seah FJ had to say on the function of assessors:

> In our opinion, when the learned trial judge said to the assessors in his summing-up that "In this trial, I am the sole judge of the law and you (assessors) are the sole judges of the fact ..." he was merely describing the division of functions between a judge and assessors in a murder trial conducted under Chapter XXI of the Criminal Procedure Code (FMS Cap. 6). Although the law allows the learned trial judge to disagree with what he regards as perverse the opinion of an assessor subject to his giving reason or reasons thereof, learned counsel for the appellant was unable to point out any passage or passages in the summing-up that the learned trial judge had usurped or attempted to usurp the function which is in the province of the assessors to determine. *In our judgment, the fact that the learned trial judge is not bound to conform to the opinions of the assessors or either of them, does not, derogate from the assessors their main function as arbiter of fact in a murder trial.* From the very name "assessors" itself they are free to give their opinion on any particular issue of fact relevant to the charge which the learned judge may specify at the trial. (emphasis added).

[29] Assessors are therefore to consider the factual aspect of a case. However, in the present case we find that the Court of Appeal did not point out any misdirection committed by the learned trial Judge in his summing up of the case to the assessors. There was also no finding or comment by the Court of Appeal that in his summing up to the assessors the learned trial judge erred in his narration and analysis of the evidence adduced or misdirected the assessors by remitting the cautioned statements of the respondents as part of the body of evidence for the case.

[30] And despite saying that there was no other evidence against the respondents other than their cautioned statements the Court of Appeal stopped short of saying that the defence of the respondents should not have been called at the close of the case for the prosecution. Basically all it said was that the learned trial judge

erred in considering the cautioned statements of the respondents as confessions and thus invoking, *albeit* indirectly, s. 30 of the Evidence Act 1950 (the Act).

[31] With respect we are of the view that the Court of Appeal took an over-simplistic approach in this case. It failed to consider the detailed summing up by the learned trial judge to the assessors who returned after deliberation with finding of facts. Such findings should not be casually ignored or interfered with by an appellate court. This is not a case of where it was alleged that the learned trial judge invited the assessors to make a particular finding of fact which would have amounted to misdirection. (See: *Juhari bin Ibrahim v. Public Prosecutor* [1973] 1 LNS 59).

[32] Moreover, the cautioned statements of the respondents were part and parcel of the evidence adduced. As such the assessors were very well-appraised of their evidential value by the learned trial judge in his summing up.

[33] For instance, this is what the learned trial judge said to the assessors, *inter alia*,:

> He (Mr. Tang, the learned defence counsel for the Respondents) further submits that even if the cautioned statements can be regarded as confessions of the accused persons, you, gentlemen assessors, have to look at them quite separately in determining the question of whether or not there was common intention on the part of the accused persons concerned and that the confessions of the other accused persons are merely to be used as corroboration. I will accept that as the correct statement of the law. This (is) provided for in section 30 of the Evidence Act. In other words, you have first and foremost to look at the confessions of the 3 accused persons, quite independently of each other and on that basis, you have to determine whether or not, there was common intention on the part of the accused persons to kill the girl by strangling her. The confessions of the coaccused persons could only be used as supporting evidence in each case.

[34] With respect we are therefore of the view that the Court of Appeal failed and thus erred when it came to its decision solely by scrutinizing the judgment of the learned trial judge without taking into account that the trial was with two assessors. If it did the outcome of the appeal before it might have been different.

A **The Issues**

1st Issue – Grounds 9 And 10 – The Learned Trial Judge Did Not Rely On Section 30 Of The Evidence Act 1950 In Convicting The Respondents

B

4th Issue – Grounds 7 And 8 – Confession Of Co-accused

5th Issue – Ground 11 – Section 30 Of The Evidence Act 1950 Is Applicable

C **[35]** We now deal with the issues raised by the appellant/prosecution. We will deal first with the above three issues together as they are interrelated.

[36] As indicated herein the crux of the judgment of the Court of Appeal is that the learned trial judge in his judgment erred in
D construing the respective cautioned statements of the respondents as confessions for murder when they were not and invoking s. 30, albeit indirectly, of the Act. Further, it was held that even if the cautioned statements amounted to confessions 'there must be other evidence independent of the cautioned statements sufficient to
E support the conviction of murder' and in this case there was none.

[37] Before us learned deputy submitted that the learned trial judge did not expressly rely on s. 30 of the Act when he considered the cautioned statements of the respondents. Instead he considered
F each cautioned statement separately and independently of each other.

[38] Learned counsel for the respondents submitted otherwise. He contended that the Court of Appeal was correct in coming to its
G decision. Indeed before us the basic thrust of learned counsel for the respondents was in support of the decision of the Court of Appeal. He emphasized that the cautioned statements must amount to confessions before s. 30 of the Act could be invoked. He also raised some other issues in particular on the proceeding before the
H learned trial judge. We have already given our view hereinabove on this aspect of his submission.

[39] We have perused the judgment of the learned trial judge. We failed to find any reference made by him to s. 30 of the Act. On
I the contrary he said this:

> To ascertain whether the act or acts of one or more or all of the accused which caused the death, was or were done in furtherance of the common intention of all of them, it is necessary to look, examine and consider the cautioned statements exh. P77, P78 and P79 quite independently of each other.

[40] Thus, if solely based on the judgment of the learned trial judge we would agree with the learned deputy that the Court of Appeal misdirected itself when it held that the learned trial judge applied s. 30 of the Act when convicting the respondents.

[41] However, in his summing up as reproduced hereinabove the learned trial judge did mention s. 30 of the Act to the assessors. What then was the significance of that reference when there was no mention in his judgment?

[42] In this case we do not think it made much difference. The reason is this. It is a principle of law that where a cautioned statement is used in a trial with the aid of assessors it is for the assessors to consider 'the issue of the truthfulness and whether any, and if so, what weight and effect to place on the cautioned statement, regard being had to the character of the cautioned statement, the circumstances leading to its making and the circumstances in which it was made. Over and above this, so as to satisfy themselves of its truthfulness', they could look for any corroborative evidence adduced. (See: *Sabaee Bujang v. PP* [2006] 1 CLJ 423). There was no complaint on the manner in which the assessors were guided on the cautioned statements of the respondents before giving their opinions. Thus, there should be no question of misdirection.

[43] The Court of Appeal held that the cautioned statements of the respondents did not amount to confessions for murder. Whether or not they did, should remain a question of fact and within the realm of the assessors since their admissibility had already been dealt with by the learned trial judge. Again there was no finding by the Court of Appeal that the assessors were misdirected on the issue. Anyway we will consider further this issue later in this judgment.

[44] Quite apart, we would also say that the admitted cautioned statements of the respondents were 'evidence' before the learned trial judge and assessors. In *Noliana Sulaiman v. PP* [2001] 1 CLJ 36 Augustine Paul J (as he then was) succinctly stated the principle when he said this at p. 45:

A Thus an unsworn statement made by an accused from the dock, being matter before the court for consideration, will be 'evidence' contrary to what has been held in *PP v. Sanassi* [1970] 2 MLJ 198 and *Lee Kon Yin v. PP* [1970] 2 MLJ 205. Similarly the confession of a co-accused is entitled to due consideration like any other evidence that has been proved unlike its treatment in the Indian Courts in view of their narrow definition of the word 'evidence' (see *Chin Seow Noi & Ors v. PP* [1994] 1 SLR 135; *Abdul Rashid & Anor v. PP* [1994] 1 SLR 119; *Lee Yuan Kwang & Ors v. PP* [1995] 2 SLR 349 and *PP v. Rozmaan bin Jusoh & Anor* [1999] 2 SLR 181)

[45] Now, going into the specifics, there was no doubt that the deceased was killed in the presence of the respondents after she was raped by them. The reason for killing her was also given by the respondents in their respective cautioned statements, that is, to avoid trouble with the police due to the rape.

[46] Who then amongst them actually killed the deceased? Based on the cumulative effect of the respective cautioned statements of the respondents, even when considered separately and independently in relation to the issue of common intention, and the other evidence adduced, circumstantial and otherwise, the responsibility should rest solely on all the respondents. There was no issue of alibi or that they had nothing to do with the killing. In fact all the cautioned statements mentioned that the deceased was strangled with a nylon string or rope in their presence and none of them did anything to stop it. In his cautioned statement the 1st respondent was in fact quite graphic on how the deceased died. It must have been a slow and painful death in that she was made to struggle for 15 to 20 minutes before breathing her last. There was also no issue that they all worked together to dispose off her body.

[47] The learned trial judge was therefore correct when he said in his judgment that although the respondents in their cautioned statements laid the blame for the actual strangling of the deceased on one another, the fact remained that the deceased was strangled to death by the act or acts of one or more or all of the respondents. And it should be noted that the respondents were jointly charged in furtherance of common intention for the murder of the deceased with specific reference to s. 34 of the Code.

[48] Hence, we would think that it should not be so much as scrutinizing the cautioned statements to find whether they contained individual and specific confessions by each of the respondents for murder. Rather their cumulative effect provided the evidence on the killing of the deceased.

[49] Accordingly, we are of the view that the Court of Appeal erred when it only focused for confessions in the cautioned statements and the application of s. 30 of the Act instead of looking at the evidence adduced as a whole in the same way as the learned trial judge did.

[50] Anyway, we are also inclined to agree with the submission of the learned deputy on the applicability of s. 30 of the Act. He rightly referred to the cases of *Prasong Bunsom & Ors v. PP* [1995] 3 SLR 433 and *Chin Seow Noi v. PP* [1994] 1 SLR 135. The latter case has some similarities with the present case. Speaking for the Court of Criminal Appeal Singapore, Yong Pung How CJ said this at p. 151:

> We were of the view that the facts admitted by the second appellant in his s. 121(1) statement gave rise sufficiently to the inferential admission that the deceased was murdered; that he was murdered by one or the other or both of the second and third appellants; and that the murder was in furtherance of the common intention of them both. Admission as to the element of common intention arose inferentially from his admission of the following facts: that the third appellant had bought a knife before the meeting with the deceased; that he (the second appellant) knew this; further that he (the second appellant) assumed that the knife would be brought along to the meeting, as shown by his answer to the first appellant when asked whether they were prepared. We found that the admission of guilt inferred was in no way weakened by the second appellant's claim that he had told the third appellant that killing was an offence and it was best not to kill the deceased. This was nothing more than a flimsy attempt to transfer all the blame on to the third appellant. As the Privy Council in *Anandagoda v. R* [1962] MLJ 289 pointed out, if the facts admitted in a statement add up to an express or inferred admission that the accused committed the essential elements of the alleged offence, then it is irrelevant that at the same time he loudly protests his blamelessness. In our view therefore, the s. 121(1) statement of the second appellant amounted to a confession by him to the charge against him and was capable of being used in relation to the first appellant (and, for that matter, the third appellant) as far as s. 30 of our Evidence Act allowed.

[51] Indeed on closer reading of the cautioned statement of the 3rd respondent we agree with the contention of the learned deputy that he did confess that they would be in trouble if the deceased escaped. This is what the 3rd respondent said, *inter alia*:

> She fell down. She got up and wanted to go out from the hut but Ah Ling pulled her back. Ah Chai said "Don't let the girl escape, otherwise we will be in trouble! Just then Ah Ling picked the nylon rope and put it round the girl's neck from behind. The girl struggled. Ah Chai and Ah Ling then pulled each end of the rope to strangle the girl's neck. **While this was done I also did say that we must not let the girl escape or else we were in trouble.** As such Ah Chai said "If we want to finish her off we must do it now and all of us are responsible! Then after struggling for a few minutes or *(sic)* being strangled with the rope by Ah Chai and Ah Ling, the girl finally fell down on the floor. Ah Chai checked and found that the girl was not breathing anymore ... (emphasis added).

[52] Hence, all the respondents had every reason to kill the deceased. As to which of them did the actual killing is therefore quite immaterial. However, as gleaned from the cautioned statement of the 3rd respondent he implicated the 1st and 2nd respondents as the persons who did the act or acts of killing the deceased.

[53] Thus, even if s. 30 of the Act was impliedly invoked by the learned trial judge as perceived by the Court of Appeal such reliance would have been justified in law.

[54] The foregoing therefore disposes off the three issues.

6th Issue - Grounds 1, 2, 3 4 - There Are Un-impeached Circumstantial Evidence Connecting All The Respondents To The Crime Of Murder

[55] The second limb of the judgment of the Court of Appeal clearly stated that 'even assuming that the cautioned statements tantamount to confession of murder, there must be other evidence independent of the cautioned statements sufficient to support the conviction of murder. In this case there was no such evidence.'

[56] As we have said above it is quite surprising that having come to such a conclusion the Court of Appeal did not venture to say that the defence should not have been called at the close of the case for the prosecution.

[57] With respect, we do not think such a statement could have been justified. There were ample circumstantial evidence relevant and implicating the respondents to the murder of the deceased. The learned deputy had concisely identified them as thus:

a. the admission by the 1st respondent that he was responsible for the ransom notes sent to deceased's family;

b. the 1st respondent came to collect the ransom money of RM3,000;

c. the 1st respondent led the police to the place where the skeletal remains of the deceased were found; and

d. the 1st respondent was the person who sent the flowery pants of the deceased to her family in order to convince them of the seriousness of his demand.

[58] It should also be noted that in addition to the above the respondents in their respective cautioned statements admitted raping the deceased and further admitted that they had every reason not to let her escape otherwise they would be in trouble.

[59] Learned deputy submitted correctly in our view that by 'themselves, those pieces of evidence might not be sufficient to convict the respondents of the crime they were charged with but when combined with the cautioned statements of the respondents either taken individually or by invoking s. 30 of the Evidence Act, it would undoubtedly confirm the guilt of the respondents beyond reasonable doubt'.

2nd Issue – Grounds 5 And 12 – There Was Common Intention Both To Rape And Murder The Deceased Hew Leh Poh

[60] This issue did not arise in the judgment of the Court of Appeal. There was no necessity since it already held that there was no evidence linking the respondents to the crime other than their impugned cautioned statements.

[61] Anyway learned deputy went on to submit on this issue. He argued that 'upon a finding of facts that there was a common intention to rape Hew Leh Poh and in furtherance of that common intention the young girl was murdered in order to prevent her from reporting on them (the respondents), the Court of Appeal clearly erred in not directing its attention to the application of s. 34 to uphold the conviction of murder imposed on the respondents'.

[62] There is merit to what the learned deputy has submitted and we are inclined to agree. In addition, it is a question of fact whether an act or acts of one or more accused persons in committing an offence was or were done in furtherance of a common intention of all the accused persons. In the present case on this issue the assessors had given their affirmative finding of fact and concurred by the learned trial judge. That should settle it since as we have said above an appellate court should be slow in interfering with findings of fact of a trial court.

3rd Issue – Ground 6 – There Was No Necessity To Identify Who Is The Actual Doer Of The Offence

[63] On closer scrutiny of the judgment of the Court of Appeal it would appear that the court was looking for a direct link of who actually amongst the respondents did the act or acts of killing the deceased. The court seemed to be quite oblivious of the fact that the respondents were jointly charged with s. 34 of the Code invoked. With respect such approach of the Court of Appeal was not quite in tandem with the settled law.

[64] Learned deputy submitted that with s. 34 invoked, 'there is no requirement for the prosecution to prove who exactly ultimately caused her death as explained in the case of *Ong Chee Hoe v. PP* [1999] 4 SLR 688 at p 701 that:

> In any case, the effect of invoking s. 34 made it unnecessary to determine who exactly the actual doer of the offence in question was. In the Privy Council decision of *Barenda Kumar Ghosh v. Emperor* AIR [1925] PC 1, the court stated:
>
> > Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself.

[65] In addition to what we have said in relation to issues 1, 4 and 5 above, we accept what was submitted by learned deputy as the correct preposition of law.

Conclusion

[66] We therefore unanimously allowed the appeal by the appellant/prosecution and restored the convictions and the sentences imposed by the learned trial judge upon the respondents.

[67] At the time of rendering the reasons for our decision one member (Dato' Azmel Maamor FCJ) of the panel which heard the appeal had retired. However the remaining members of the panel are unanimous in this grounds of judgment. (See: *The Board Of Trustees Of The Sabah Foundation & Ors v. Datuk Syed Kechik Bin Syed Mohamed & Anor* [2008] 3 CLJ 221).

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